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In the

Supreme Court of The United States

OCTOBER TERM, 1972

No. 73-167

GRAFF VENDING COMPANY, et al.,

Petitioners,

v.

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Graff Vending Company, Floyd V. Price, and Herbert Goldstein, Petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on May 9, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported; it is printed in Appendix B, infra, pp. B-1 - B-17.

JURISDICTION

The Judgment of the Court of Appeals was dated and en-

tered on the same day as the Opinion, May 9, 1973, and is printed in Appendix C, infra, p. C-1. Petitioners' Motion for Rehearing was denied by the Court without an opinion by Order dated June 11, 1973, which Order is printed in Appendix D, infra, p. D-1.

There was no formal opinion of the District Court. The Judgment of the District Court for the Western District of Texas is printed in Appendix E, infra, pp. E-1 - E-2. The Findings of Fact and Conclusions of Law of the District Court are printed in Appendix F, infra, pp. F-1 - F-6.

The jurisdiction of the Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, on appeal from a judgment on the merits by the District Court, rightly held that the District Court tried the case on the wrong theory and, therefore, the Court of Appeals was not bound by the District Court's Findings of Fact.

2. Whether the Court of Appeals properly disregarded the Findings of Fact of the District Court where the Findings were not shown to be clearly erroneous as provided in Rule 52(a), F.R.C.P., 28 U.S.C.A.

3. Whether the Court of Appeals should reverse and remand this cause to the District Court for further consideration of injunctive relief and attorney fees where Respondent admitted, through his attorney, that he had suffered no monetary damages and failed to prove monetary damages.

STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

This case involves the Clayton Act, as amended by the Robinson-Patman Act, Title 15 U.S.C.A. Sec. 13(a) and (b), Title 15, U.S.C.A., Sec. 15 and 26, and Rule 52(a) of the Federal Rules of Civil Procedure, which are printed in Appendix A, infra, pp. A-1 - A-4.

STATEMENT

This action was instituted by Respondent in the United States District Court for the Western District of Texas seeking a preliminary and permanent injunction, as well as damages and attorney's fees, alleging that Respondent "* * * has heretofore purchased said Leaf gum from the Defendant, Graff Vending Co.", (C.A. Appendix, p. 7). Respondent contended that a sale put on by Petitioners, multi-market sellers, in the Houston and San Antonio geographical market areas violated "* * * Title 15, U.S.C. Section 13(a) by discrimination in prices, the effect of such discrimination being to substantially lessen competition, by eliminating competition from your Plaintiff, and to tend to create a monopoly in this particular line of commerce * * *" (C.A. Appendix, p. 8). Respondent contended his current cost of goods would not permit him to make a profit if he meets Petitioners' prices.

Upon hearing the Application for a Preliminary Injunction, the District Court granted same enjoining the Petitioners from selling through the San Antonio office or to their San Antonio office customers "* * * ball gum, charms and bulk vending machines at a price less than that at which defendants were selling said products through the San Antonio office or to the

San Antonio office customers prior to May, 1972 * * *" (C.A. Appendix, p. 14).

At the preliminary injunction hearing, the evidence showed that the manufacturer of Leaf Gum gave a discount to Petitioner Graff Vending Co. on merchandise to be sold in the San Antonio and Houston offices and it was this discount that was passed along by Petitioner Graff Vending Co. to its customers (Supp. Tr. p. 60) so that the merchandise was not sold "* * * at and below cost * * *"as alleged by Respondent. The evidence showed at trial on the merits that, even at the sales price, Leaf Gum was higher than American Gum (Tr. p. 61). The evidence failed to show that Respondent could not purchase from Petitioner Graff Vending Co. at the sale price like any other customer. While the preliminary injunction was in force, Respondent sold the same type vending machines for $156.00 that the Court order required Petitioners to sell for $192.50 (Tr. p. 67).

The District Court entered its judgment dissolving the preliminary injunction, denying permanent injunctive relief, damages, attorney fees and costs. (App. E, p. E-2.)

Respondent appealed that judgment to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered judgment May 9, 1973, reversing the cause and remanding it to District Court in accordance with the opinion of the Court of Appeals of the same date which affirmed the District Court's judgment on damages since there was a failure of proof of damages but instructed the District Court to give further consideration to permanent injunctive relief, attorney fees and costs. The Court of Appeals' opinion (See App. B, p. B-16)

held that the District Court tried the case on the theory of secondary line discrimination instead of primary line discrimination and, therefore, the findings of the District Court are not entitled to the mantle of protection normally afforded District Court findings under Rule 52(a), Fed. R. Civ. P.[1] The Court of Appeals found "* * * after a careful review of the record, that there is both a reasonable probability, that the effect of Graff's reduced prices on Leaf Gum products may be to substantially lessen competition."[2]

Petitioners filed their Motion for Rehearing,[3] calling the attention of the Court of Appeals to the District Court's remarks beginning on line 23, page 8 of the Transcript, which Petitioners alleged showed the District Court did try the case on the right theory and, since the District Court's Findings of Fact upon which the judgment was based were supported by the evidence, same should not be set aside in that they were not clearly erroneous.[4] The Motion for Rehearing was denied by the Court of Appeals on June 11, 1973 (See Appendix D, p. D-1) and the Mandate was stayed to July 26, 1973.

REASONS FOR GRANTING WRIT

1. Direct conflict with decisions of this Court.

The Court of Appeals for the Fifth Circuit has decided a Federal question of substance in a way that is not in accord with applicable decisions of this Court. The Circuit Court's

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[1] Rule 52(a), Fed. R. Civ. P., Appendix A-1.

[2] The District Court's Findings of Fact included "11. The sale put on in the San Antonio and Houston office would not have the effect of substantially lessening competition."

[3] See Motion for Rehearing transmitted from the Court of Appeals.

[4] Rule 52(a), Fed. R. Civ. P., Appendix A-1.

holding that "* * * the Court's findings had obvious reference to a case of secondary line discrimination. While we have no quarrel with the finding in that context, it is in no way binding on us when the case is properly construed as primary line discrimination * * *" completely ignores the record of the District Court on the merits where the District Judge noted "He's apparently a wholesaler in some respects and a retailer in others. At one place, he couldn't be a competitor and the other one, he might be."[5] The holding also ignores the District Judge's interrogation of the Petitioner's sales manager where the Court directed the following question to the sales manager and received the answer indicated:

> "Q. Is Hampton a competitor of yours in either of two categories, as an operator or as a wholesaler? And if so, explain to me why.
>
> A. He's a competitor of ours as a wholesaler, using that term, sir, because he is selling merchandise to operators in this area in competition with us."[6]

The Court's holding that "* * * Although other companies manufacture comparable gum the evidence indicated no substantial competitive activity by them in the San Antonio area before the sale, much less during it", is contrary to the record in this cause.[7]

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[5] For entire exchange between the Court and counsel for Respondent, see Transcript on merits, beginning line 23, page 8.

[6] For the Court's complete interrogation of the witness, see Transcript on the merits, beginning line 17, page 58.

[7] See Supp. Tr., testimony at preliminary injunction, beginning line 21, page 65, as follows:

> "A. American Gum Company, the company that Mr. Hampton has bought the gum from and Creamer Gum Company and large operators there have been selling gum in the Houston area, in the San Antonio area at prices that we compute to be the same as they are selling to Mr. Hampton no matter what their category was. This

The decision of the Court of Appeals is in conflict with the decision of this Court in *United States of America v. Yellow Cab Company*, 338 U.S. 338, 94 L. Ed. 150, 70 S. Ct. 177, where this Court stated at page 340:

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own.
>
> * * * If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.
>
> It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact,

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cut into our business in the Houston and the San Antonio areas. So we went to Leaf Gum Company and asked them could we get some promotional help in order to retain some of our business that we were losing to American Gum, Creamer Gum and other gum companies who were selling direct to the operators. Leaf Gum Company gave us an allowance of $1.50 a case on penny gum, 90 cents a case on nickel gum. That is the exact figure that we have passed on to our operators.

Q. Okay. And that was arranged through you and Leaf Company because of the competition that you were having in the Houston and San Antonio areas, is that correct?

A. From out-of-state gum companies, yes, sir."

Other out-of-state gum companies are identified as Standard Specialty Company of Oakland, California, U.S. Chewing Gum Company of Oakland, California, Fleer Gum Company of Havertown, Pennsylvania and Don Russ Gum Company of Memphis, Tennessee. See Transcript on the merits beginning line 22, page 55, through line 9, page 56.

> the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

The action of the Court of Appeals amounted to a trial de novo in that Court, setting aside the findings of the District Court and substituting its own findings therefor. The District Court's finding number 11 found the sale would not have the effect of substantially lessening competition but the Court of Appeals found "* * * After careful review of the record, that there is both a reasonable possibility and a reasonable probability that the effect of Graff's reduced prices on gum products may be to substantially lessen competition." (Appendix B, p. B-10).[8]

The Government in the *Yellow Cab Co.* case, supra, had argued that the trial court's findings should be set aside on the ground of a "definite and firm conviction that a mistake had been made", citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525, but this Court rejected said argument as being inapplicable. The Court of Appeals in this case committed the error that the Government unsuccessfully urged on this Court in *Yellow Cab*, supra.

In holding that Petitioners failed to prove a Sec. 2(b) defense, Title 15 U.S.C.A. § 13(b), the Court of Appeals also

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[8] The Court of Appeals cited Federal Trade Commission v. Morton Salt Company, 1948, 334 U.S 37, but an examination of that case indicates that this Court left the responsibility for finding the facts to the Federal Trade Commission, which Commission, like the District Court Judge in this case, was asked to make a finding on whether or not the price difference would injure or destroy competition.

disregarded the District Court's Findings of Fact. Under Rule 52(a), this Court has long held that where findings of the Trial Court are supported by the evidence, they will not be disturbed on appeal. *Atlantic and Pacific Tea Co. v. Grosjean*, 1937, 57 S. Ct. 772, 301 U.S. 412, 420, 81 L. Ed. 1193, 112 A. L. R. 293, rehearing denied, 58 S. Ct. 3, 302 U.S. 772, 82 L. Ed. 599. Petitioners in this case introduced sufficient evidence for the Trial Court to find a Sec. 2(b) defense. That proof was sufficient to demonstrate to the Trial Judge the existence "* * * of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor * * *" and this is in accordance with this Court's holding in *Federal Trade Commission v. A. E. Staley Manufacturing Company*, 1945, 324 U.S. 746, 89 L. Ed. 1338.

2. Conflict with decisions of other Courts of Appeal.

Although the Court of Appeals cited *Calloway Mills Co. v. Federal Trade Commission*, 5th Cir., 1966, 362 F. 2d 435, in support of its decision in this case, a careful examination of that case reflects that the Court of Appeals held the Federal Trade Commission's conclusions to be arbitrary and in complete disagreement with the findings of the Trial Examiner and material and substantial evidence upon which the Trial Examiner made his findings. The Court of Appeals in this case fell into the same errors as did the Federal Trade Commission in the Calloway Mills case, supra.

Petitioner's supplier reduced the cost to Petitioner on the gum. Petitioners passed this reduction in cost along to its customers. It has been held that:

> "We do not believe, as apparently the Commission does, that the Robinson-Patman Act was intended to freeze prices at the level which would return a profit to a competitor in a market with the highest costs. For such an interpretation of the act would sacrifice the interests of the consumer and competition to the interests of a single competitor." *Dean Milk Co. v. Federal Trade Commission*, 7th Cir. 1968, 395 F. 2d 696, 701.

Although Respondent competed with Petitioners in the wholesale portion of his business,[9] the evidence also showed that shortly before Petitioners' sale the Respondent purchased his gum from Petitioners and, therefore, competed with Petitioners on some basis other than price.[10] Petitioners had lost customers, Respondent being one of its customers it had lost. The Petitioner was not attempting to put Respondent out of business but, on the other hand, was attempting to regain him as a customer in both his retail business in which he did not compete with Petitioner, as well as his wholesale business in which he did compete with Petitioner but, as aforesaid, not necessarily on the basis of price. In *Balian Ice Cream Co. v. Arden Farms Co.*, 9th Cir. 1955, 231 F. 2d 356, writ of certiorari denied 1956, 76 S. Ct. 545, the Court held that:

> "Arden did not embark upon a campaign by selling goods shipped in interstate commerce at a loss in a local area to punish or designedly try to cause loss to one weaker competitor. It had no design to eliminate such a competitor and put him out of business by giving guaranties against loss to its own sales customers. Therefore, the doctrine of Porto Rican American Tobacco Co. of Porto Rico v. American Tobacco Co., 2 Cir., 30 F. 2d 234, has no relation to the situation here.

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[9] Respondent was also in the retail business in the San Antonio area but Petitioners were not in the retail business.

[10] See Court of Appeals Appendix, p. 7.

> * * * The difference in price between various states did not substantially lessen competition or tend to create a monopoly in ice cream products. There was no evidence that trade or commerce, interstate or otherwise, was lessened or burdened by any action of defendants in this case."

This case differs from *Surprise Brassiere Co. v. Federal Trade Commission*, 5th Cir. 1969, 406 F. 2d 711, in that the Commission found the facts against Surprise in that case and the Court of Appeals found there were no facts to warrant a different finding. In this case, as stated above, the District Court made Findings of Fact in support of its judgment based upon testimony before it from witnesses whose credibility the Court had an opportunity to observe.

3. Conflict with other decisions and provisions of the statutes.

The Court of Appeals held, as did the District Court, that Respondent was not entitled to damages and each Court observed that Respondent's counsel had so admitted. It was clearly error, therefore, for the Court of Appeals to remand the case for consideration of attorney fees since the only provision for the recovery of attorney fees is coupled with damages.[11] On the other hand, Title 15 U.S.C.A. Sec. 26, which permits a private party to bring suit for injunctive relief, makes no provision for the recovery of attorney fees.[12] In *Alden-Rochelle, Inc. v. American Soc. of Composers, Authors and Publishers*, S. D. New York 1948, 80 F. Supp. 888, in regard to attorney fees, the Court stated:

> "I have concluded that plaintiffs have not shown any injury from defendants' violations of the anti-trust laws and that, even if we presume injury, plaintiffs have not

[11]Title 15 U.S.C.A. § 15 is printed in Appendix A, p. A-3.

[12]Title 15 U.S.C.A. § 26 is printed in Appendix A, p. A-3.

> proved any thing from which the court could approximate the damages. It follows that plaintiffs are not entitled to a money judgment and therefore cannot be awarded 'a reasonable attorney's fee' under 15 U.S.C.A. § 15. 'The Court cannot properly award it except as an incident to the successful prosecution of a law action for recovery of damages based on a violation of the anti-trust laws.' Allen Bradley Co. v. Local No. 3, D.C., 51 F. Supp. 36 at page 40. In Decorative Stone Co. v. Building Trades Council, 2 Cir., 23 F. 2d 426, 428, it was held that 'the allowance of an attorney's fee * * * is incidental to the statutory right to damages, and was properly denied in the equity proceedings,' brought under 15 U.S.C.A. § 26. Even though plaintiffs have made out a case for equitable relief under 15 U.S.C.A. § 26 they may not recover 'a reasonable attorneys' fee' because they have failed to establish their claim for damages under 15 U.S.C.A. § 15."

Ring v. Spina, S.D. New York 1949, 84 F. Supp. 403, likewise holds that attorney fees are not allowed where no damages are proved.

The facts in this case are very different from the facts of the case on which the Court of Appeals relied in remanding this case to the District Court to examine whether or not Respondent is entitled to a reasonable attorney fee.[13] In this case, Respondent proved no damages. In said case relied on by the Court of Appeals the Plaintiff had a recovery of treble damages in the amount of $150,000.00 which, under 15 U.S.C.A. § 15, clearly entitled the Plaintiff in that case to attorney fees and but for which he would not have been entitled to attorney fees.

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[13]The Court of Appeals cited only one case as authority for further consideration of attorney fees, that being Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1970, 431 F. 2d 334, cert. denied 1971, 401 U.S. 912.

The harm arising from an injunction would far outweigh Respondent's interest in securing it. Respondent is not entitled to have the Court further consider injunctive relief in this case since he has not shown any damages to him, as distinguished from the public generally, and Respondent has used the injunctive relief for unfair competition in this case by selling merchandise at lower prices while the Petitioner was under a preliminary injunction. (Tr. p. 67).

> "The general objectives of the Patent Laws and the Anti-Trust Laws are the same. Both are intended to prevent unfair competition." *United States v. Parker-Rust-Proof Co.*, E.D. Michigan 1945, 61 F. Supp. 805, 812.

Respondent used the anti-trust laws in this case for the reverse of those purposes.

In the Court of Appeals' opinion, it is pointed out that Respondent's sales decreased by one-third (1/3). An examination of the record seems to indicate that the large decrease testified to by Respondent was in his "projected sales", not in his actual sales. Said testimony shows Respondent's actual gum sales for the period May 19 to June 18 were $1,982.00 (Tr. ln. 25, p. 233-ln. 49, p. 234). From June 19 to July 18, while Petitioner was forced by preliminary injunction to sell at pre-sale prices, Respondent's gum sales were $2,086.59, up only $103.72 from the period immediately preceding the injunction while the sale was in effect. The preliminary injunction was not granted until June 15, 1972, and the sale was on during the entire May 19-June 18 period, save and except for the last three days.

The substance of Respondent's complaint is that Petitioner should by injunction have a base below which it could not

sell its products while leaving Respondent free to reduce his prices below that base, as he did while the preliminary injunction was in force.

> "It may be said Congress did not put a floor under all existing prices so these could never be lowered by a firm doing interstate business. Certain economists contend for this construction. Such a situation would not be in the public interest. The people are interested in obtaining goods at the lowest price possible, if competition is not vitally affected thereby. The assumption suggested above would ring the death knell of competition." *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d 356, 367.

As pointed out in footnote 7 hereof, the Petitioner's reduction in price exactly equaled the reduction it had received in its costs of goods from its supplier, which may even be specifically permitted under Title 15 U.S.C.A. Sec. 13(a), which provides, in part, that "* * * And provided further, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned * * *" The evidence was undisputed that the market for Petitioner's goods in the Houston and San Antonio areas had decreased.

Since Respondent showed no damages to himself or his business and there was no substantial lessening of competition, he, as an individual, is not entitled to seek injunctive relief.

> "An individual plaintiff is not entitled to sue by reason of violations resulting in injury to other persons or to the public. Correction of the latter evil is the function of the government alone." *Westor Theatres v. Warner Bros. Pictures*, D. New Jersey 1941, 41 F. Supp. 757, 763.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dallas, Texas 75201,

Attorney for Petitioners.

PROOF OF SERVICE

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn upon oath stated: I, EARL LUNA, am a member of the bar of the Supreme Court of the United States and have been the attorney of record for petitioners herein in all proceedings had in the Courts below.

I further state upon oath that upon the 20th day of July, 1973, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent, Kenneth J. Hampton, d/b/a Hampton Vending Supply, by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. James L. Branton, of Carter, Callender, Branton & Gonzalez, Suite 200, 140 Main Plaza, San Antonio, Texas 78205.

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said EARL LUNA, this the 20th day of July, A. D. 1973.

Notary Public in and for
Dallas County, Texas